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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOBBY L. BUTCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

No. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I QUESTIONS PRESENTED

A. Whether the District Court's erroneous instruction using the common law definition of partnership rather than the more liberal federal tax law definition was cured by the subsequent instruction listing factors to be considered in determining whether a partnership exists.

B. Whether the jury was adequately apprised of petitioner's theory of the case.

C. Whether the erroneous partnership definition materially affected the verdict and constitutes reversible error.

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IV. OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the 9th Circuit has not been officially reported as of this date. A copy of the opinion is printed in Appendix A. A copy of the order below, denying petitioner's petition for a hearing is printed in Appendix B.

V. JURISDICTIONAL GROUNDS

The judgement of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra) was entered on March 29, 1972. A timely motion for rehearing was denied on

May 5, 1982 (Appendix B, infra). On May 19, 1982, the United States Court of Appeals for the Ninth Circuit entered an order staying the issuance of the mandate for a period not to exceed June 11, 1982 in order to permit application to this Honorable Court for a writ of certiorari. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254 (1).

VI. STATUTES INVOLVED

1) The statute under which petitioner was prosecuted was 26 U.S.C. § 7206 (1).

"§ 7206 Fraud and False Statements.

Any person who -

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or"

2) 26 U.S.C. § 761

"§ 761. Terms defined.

(a) **Partnership.** For purposes of this subtitle, the term "partnership"

includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate. Under regulations the Secretary or his delegate may, at the election of all the members of an unincorporated organization, exclude such organization from the application of all or part of this subchapter, if it is availed of -

(1) for investment purposes only and not for the active conduct of a business or

(2) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted,

if the income of the members of the organization may be adequately determined without the computation of partnership taxable income."

3) 26 U.S.C. § 702

702. Income and credits of partner

(a) **General rule.** In determining his income tax, each partner shall take into account separately his distributive share of the partnership's -

(1) gains and losses from sales or exchanges of capital assets held for not more than 6 months,

(2) gains and losses from sales or exchanges of capital assets held for more than 6 months,

(3) gains and losses from sales or exchanges of property described in section 1231 (relating to certain property used in a trade or business and involuntary conversions),

(4) charitable contributions (as defined in section 170(c)),

(5) dividends with respect to which there is provided an exclusion under section 116 or a deduction under part VIII of subchapter B,

(6) taxes, described in section 901, paid or accrued to foreign countries and to possessions of the United States,

(7) partially tax-exempt interest on obligations of the United States or on obligations of instrumentalities of the United States as described in section 35 or section 242 (but, if the partnership elects to amortize the premiums on bonds as provided in section 171, the amount received on such obligations shall be reduced by the reduction provided under section 171(a)(3)),

(8) other items of income, gain, loss, deduction, or credit, to the extent provided by regulations prescribed by the Secretary or his delegate, and

(9) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection."

VII. STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of Proceedings

On November 26, 1980, a federal grand jury for the District of Arizona returned a superseding indictment charging Bobby L. Butcher ("defendant") with willfully and knowingly subscribing to a false federal income tax return for the calendar year 1973 in violation of 26 U.S.C. § 7206 (1) (Count 1) and with failing to file a federal income tax return for the calendar years 1974 and 1975 in violation of 26 U.S.C. § 7203 (Counts II and III) CR (26).

The defendant entered a plea of not guilty to all counts of the superseding indictment and on February 2, 1981 the matter proceeded to trial before a jury with the Honorable Wesley E. Brown, United States District Judge for the District of Kansas, presiding. On February 9, 1981 the jury returned a verdict of guilty as to each count of the indictment and on March 23, 1981 judgment was entered and defendant was sentenced to two years imprisonment and a fine of $2,000.00, plus the costs of prosecution, as to Count I, one year of imprisonment and a fine of $2,000.00, plus the costs of prosecution, as to each of

Counts II and III to run consecutively with one another and concurrently with the sentence imposed as to Count I CR 66. A timely notice of appeal was filed on March 29, 1981 CR 67.

On appeal, the Court of Appeals for the Ninth Circuit affirmed.

B. Relevant Facts Concerning the Underlying Conviction.

For the calendar year 1973, defendant subscribed to and filed an individual income tax return (Form 1040) in which he reported gross income of $926,697.45. This income was from a variety of different sources. The government alleged that defendant omitted four items of gross income totalling $601,954.46 from his 1973 return: namely, $528,343 in trailer sales from the Sunset Mobile Homes lot located on South Palo Verde in Tucson ("South Palo Verde lot"); $18,950 in manufacturers' rebates for trailers sold; $18,079.59 in "dealer participation" or commissions from financial institutions for arranging the financing of mobile homes; and $36,581.87 in Arizona State sales tax collected from

purchasers of mobile homes but not paid over to the state.

Defendant's principal contention is that the South Palo Verde lot was a partnership during 1973, and that he was, therefore, required to report only the net income from the partnership on his individual return. 26 U.S.C. § 702(a)(8). According to the unrebutted testimony of both defendant and the business associate responsible for managing the South Palo Verde lot, the lot had lost money during 1973 (RT B71). In any case, if the jury had found that a partnership existed, the $528,343 in trailer sales from the South Palo Verde lot, as well as the $18,079.59 in dealer participation from the sales, would not be items the defendant was required to report on his individual income tax return.

From the ambiguous testimony of the witnesses it is unclear precisely how the manufacturer's rebates and sales tax items would have been affected by a finding that a partnership existed. Defendant's former business associate testified that he believed that at least some of the manufacturers' rebates had been distributed

to him as a share of the gross profits to be used to defray the operating expenses of the South Palo Verde lot (RT B73). As to the unpaid sales tax, the evidence showed that a total of $64,796.04 in sales tax has been collected from mobile home purchasers, that $28,214.17 had been paid over to the State and that $36,581.87 remained unpaid. An undetermined portion of the sales tax would have been allocable to the South Palo Verde lot and thus reportable only on the partnership tax return.

Therefore, the existence of a partnership in the South Palo Verde lot would completely eliminate two of the four items (the lot's trailer sales and dealer participation) which the government alleges were omitted from defendant's 1973 individual income tax return, and partially eliminate the two remaining items. The two items which would be completely eliminated are $546,422.59 of the alleged $601,954.46 total. As to the remaining omissions, defendant testified that he had filed his state sales tax return for 1973 using an "average" figure, and that he did not believe thay any underpayment would result

in taxable income since his liability to the State for payment of any balance remained (RT B226-27). Defendant also testified that while he did not believe that his 1973 return was complete as filed, he had no knowledge of the specific omissions alleged by the government. Thus, even if the jury found that part of the $18,950 in manufacturers' rebates and $36,581.87 in unpaid state sales tax should have been reported on defendant's individual return, it could have found that the omission was not willful or, in light of the expenses defendant testified that he had incurred but not claimed as deductions, immaterial.

Both the government and defendant produced evidence as to the existence or non-existence of a partnership in the South Palo Verde lot. The evidence produced by the government can be summarized briefly. Special Agent Lujan testified that during approximately 22 interviews with defendant over a two-year period, the only lot defendant referred to as a "partnership" was the Valley Sunset Mobile Homes lot (RT A129, A138). Smit, who managed the South

Palo Verde lot in 1974, testified that he did not intend to be a partner in the lot (RT B6-7). Carrigan, a partner in Valley Sunset Mobile Homes, testified that a partnership income tax return had been filed in 1973 for Valley Sunset (RT B42-43).

Yarborough, who managed the South Palo Verde lot in 1973, testified that he had a "profit-sharing arrangement" with the defendant (RT B59-60). While Yarborough stated that he did not have a formal discussion with the defendant about being a general partner in the business and served as a lot manager, he also testified that, "I always considered myself a partner" (RT B67-68).

Armstrong, a vice president of the First National Bank of Arizona and manager of the Dealer Finance Center in Tucson, testified that defendant had signed a security agreement in 1973 listing himself as the owner of Sunset Mobile Homes (RT 85-86). Similarly, Eskew, a manager of the United Bank of Arizona in Tucson, testified that a dealer servicing agreement indicated that Sunset Valley Mobile Homes was a sole

proprietorship (RT B134). Finally, defendant testified that no certificate of operation under a fictitious name was filed with the State of Arizona (RT B250).

C. The Appeal

On appeal, the Court of Appeals affirmed. The court held that "the jury instructions defining partnership adequately, fairly, and correctly articulated the legal standard for determining whether a partnership exists for federal tax purposes" because, "taken in the context of the instructions as a whole, "any undue emphasis given to the element of "co-ownership" in the district court's instruction was cured by a subsequent instruction listing factors to be considered by the jury in determining whether a partnership existed for tax purposes. The court also held that, even if the first instruction was erroneous, the error was harmless.

The court dealt only briefly with the adequacy of the instruction on petitioner's theory of the case. On this issue the court held that the instructions adequately

covered petitioner's theory of the case; it was not error to refuse to use the precise language appellant had requested.

D. Existence of Jurisdiction Below

The U.S. District Court for the District of Arizona had jurisdiction over the petitioner under 26 U.S.C. § 7206 (1).

VIII. REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Honorable Court and has sanctioned an unusual departure from the accepted course of judicial proceedings in criminal trials.

A. The District Court's erroneous instruction using the common law definition of partnership rather than the more liberal federal tax law definition was not cured by the subsequent instruction listing factors to be considered in determining whether a partnership exists.

For federal income tax purposes, the question of whether the South Palo Verde lot was a partnership in 1973 is governed

by federal rather than state law. Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 287-88 (1946); Burde v. Commissioner of Internal Revenue, 352 F.2d 995, 1002 (2d Cir. 1965), cert. denied, 383 U.S. 966 (1966); Estate of Kahn v. Commissioner of Internal Revenue, 499 F.2d 1186, 1189 (2d Cir. 1974). Title 26 U.S.C. § 761(a) as it was in effect at the time defendant's 1973 return was filed provided:

> The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation.

The same definition is given in 26 U.S.C. § 7701(a)(2). While the Internal Revenue Code does not provide a more precise definition of partnership, the regulations make clear that,

> The term "partnership" is broader in scope than the common law meaning of partnership, and may include groups not commonly called partnerships.

Treas. Reg. § 1.761-1; accord, McManus v. Commissioner of Internal Revenue, 583 F.2d 443, 447 (9th Cir. 1978).

The Supreme Court has defined partnership more precisely as follows:

> A partnership is generally said to be created when persons join together their money, goods, labor, or will for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.

Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 286 (1946); accord, Commissioner of Internal Revenue v. Culbertson, supra, 337 U.S. at 740.

Defendant's requested instruction no. 15, which was refused by the court, is similar to the Supreme Court's definition of partnership and reads as follows:

> Partnership defined. A partnership is the relationship existing between two or more parties who join together to carry on a trade or business, with each person contributing money, labor, property, or skill and all expecting to share in the profits and losses of the business.

> For income tax purposes the term partnership includes (in addition to an ordinary partnership) a syndicate, group, pool, joint venture, or similar organization that is carrying on a business and that is not classified as a trust, estate, or corporation.
>
> The controlling factor is the intent of the parties.

(CR 39-17).

However, in place of this the court instructed the jury as follows:

> (Y)ou are instructed that a partnership is an association of two or more persons to carry on as co-owners a business for profit.

(emphasis supplied); (RT C418-19). After its definition of partnership, the court listed a number of factors set out more fully below which the jury could consider in determining whether a partnership existed.

The particular vice of the instruction given, which was taken from the common-law definition of partnership codified in the Uniform Partnership Act, is that it unduly emphasizes an element -- that of "co-

ownership" -- "which is not essential to a partnership under federal statutory law or case law." Treas. Reg. § 1.761-1.

The use of the more restrictive common law definition which improperly emphasizes the "co-ownership" aspect of a partnership was particularly prejudicial in this case. A properly instructed jury might well have concluded that a partnership did not exist for the South Palo Verde lot under common law but that there was, in fact, a partnership entity for federal income tax purposes.

Moreover, the testimony of several witnesses together with the court's instructions evidenced considerable uncertainty about the meaning of the term "partnership."

Smit testified that he was not a partner even though he had an agreement to split profits with defendant "50/50" (RT B6-7). Morehead testified:

> As far as being a general partner, I don't really know what you mean by general partner, but I guess you could call it a partnership because we were

supposed to be splitting everything on the lot, the expenses and the profits.

(RT B16). Carrigan first testified that, "we were, in fact, partners; but on paper it was still a sole proprietorship" (RT B43). Later during the government's examination he stated:

Q But it's your testimony here today now that you had, in fact, a partnership in 1975?

A Well, I don't know what you mean exactly. We had an understanding, let's say, that half the profits would be his and half the profits would be Charlie's and mine. I don't know if the business was a sole proprietor, it was on paper; and, in fact, so forth, but we had an understanding we would get half the profits.

(RT B49). As noted above, Yarbourgh testified that while he did not have a formal discussion with the defendant about being a general partner he did state:

Q Anybody ever sit down or walk up to you and tell you that you were a partner in that lot in Palo Verde?

A I always considered myself a partner.

Q You did?

A To that extent, yeah. I was working with him.

(RT 67-68).

In all of the alleged partnership arrangements between petitioner and the lot managers, the agreement was that petitioner would provide the mobile homes and the managers would provide the services to operate the lot. The partnership instruction given to the jury effectively precluded a finding that such an arrangement was a partnership, even though it fits well within the Internal Revenue Code definition of partnership.

The Court of Appeals found that the inaccuracy of the court's partnership definition was cured by the list of factors which the court instructed the jury it could take into account in determining whether a partnership existed. The court instructed the jury:

> In determining whether or not the defendant's business ventures were partnerships, you may consider the following: the agreement of the parties and their conduct in executing its

terms; the contributions, if any, which each party has made to the venture; the parties' control over income and capital and the right of each to make withdrawals; whether each party was a principal and co-proprietor, sharing a mutual and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; whether the business was conducted in the joint names of the parties; whether the parties filed federal partnership returns or otherwise represented to persons with whom they dealt that they were partners; whether separate books of account were maintained for the venture; and whether the parties exercised mutual responsibility for the enterprise. (RT C418-419).

Accepting the Court's holding that the subsequent list of factors cured any undue emphasis on the element of "co-ownership" and that all of the relevant factors listed in the district court's subsequent

instruction indicate that the South Palo Verde lot was not a partnership, an essential defect in the district court's partnership instructions remains. The crucial test for determining the existence of a partnership for tax purposes--a test which should have been embodied in the district court's initial partnership instruction and to which the subsequent list of factors was directed--was whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." Commissioner of Internal Revenue v. Culbertson, 337 U.S. 733, 742 (1949) (emphasis added). Appellant's requested instruction no. 15, which was refused by the district court, stated, in part: "The controlling factor is the intent of the parties" (CR 39-17).

Petitioner testified at trial that he had intended to form a partnership with Yarbourgh in the South Palo Verde lot (RT B234). Moreover, on direct examination by the government, Yarbourgh testified, "I always considered myself a partner" (RT B67-68). The jury should have been given an

opportunity to assess the credibility of this testimony in determining whether a partnership existed in the South Palo Verde lot; testimony by the partners certainly bears on their intent. As the Court has noted by implication in its statement that "every relevant factor indicates that the south Palo Verde lot was not a partnership," the district court's partnership instructions gave the jury no reason to consider the partners' testimony in determining whether a partnership existed.

The vice of the district court's instruction is particularly great in the present case which, unlike the cases from which the district court's list of factors was derived, is a criminal case. Petitioner is not guilty of willfully and knowingly subscribing to a false federal income tax return in violation of 26 U.S.C. § 7206 simply because a partnership did not, in fact, exist in the South Palo Verde lot. The issue is, rather, whether petitioner intended to create a partnership or in good faith believed a partnership existed, in which case he did not knowingly or

willfully violate the statute. Not only did the district court's partnership instructions fail to inform the jury that intent is the key factor in determining the existence of a partnership for tax purposes and that petitioner's and Yarbourgh's testimony were relevant, it also made the actual existence of a partnership determinative of petitioner's guilt or innocence.

Neither of the district court's partnership instructions made any mention of the intent of the partners, which is the crucial factor in determining whether a partnership exists for federal tax purposes. Instead, the district court defined a partnership according to the more restrictive common law definition, codified in § 6 of the Uniform Partnership Act, as "an association of two or more persons to carry on as co-owners a business for profit." This definition deprived petitioner of the testimony bearing on his intent and the intent of Yarbourgh, and suggests that each partner is required to have an equity or ownership interest in the tangible assets of the partnership (in

this case the inventory of mobile homes). The definition is particularly prejudicial in the present case because it meshed exactly with the government's strategy of establishing that a partnership did not exist in the South Palo Verde lot by showing that Yarbourgh and others had no ownership interest in the partnership's tangible assets. However, as the regulations, the Supreme Court, and the Uniform Partnership itself make clear, it is the division of profits, not co-ownership of assets, which is a key factor in determining whether a partnership exists. Treas. Reg. § 1.76-1; Commissioner of Internal Revenue v. Culbertson, 337 U.S. at 740; Uniform Partnership Act § 7(4); Appellant's Opening Brief at 7-11. It is not uncommon for one partner to contribute capital to a partnership while another partner contributes services, and the assets may revert to the contributing partner on dissolution of the partnership.

The fact that there was a profit-sharing arrangement between petitioner and Yarbourgh in the South Palo Verde lot (RT B59-60), and the testimony of appellant and

Yarbourgh that they considered themselves to be partners, was sufficient evidence for the jury to have found that a partnership existed in the lot.

The error in the district court's partnership instruction was not cured by the subsequent instruction listing factors to be considered in determining whether a partnership exists because that instruction still did not apprise the jury of the relevance of the testimony by petitioner and Yarborough going to their intent to operate the South Palo Verde lot as a partnership: There was, therefore, sufficient evidence in the record from which the jury might have found, if properly instructed, that a partnership existed.

B. The jury was never adequately apprised of petitioner's theory of the case.

The Court of Appeals held that the jury was adequately apprised of petitioner's theory of the case, that "the jury was instructed as to appellant's contentions . . . that the South Palo Verde lot was a partnership, whose gross income did

not have to be reported on appellant's individual tax return," and that "it was not error to refuse to use the precise language appellant had requested."

This case turns on the question of whether defendant may have believed that the South Palo Verde lot was a partnership for tax purposes, in which case he would either have no duty to report partnership gross income on his individual return (if a partnership in fact existed under federal law), or the omission of the partnership income from his individual return would not have been willful, which is an essential element of the offense of subscribing to a false return under 26 U.S.C. § 7206(1).

That the existence of a partnership in the South Palo Verde lot was the paramount issue in the case was never made clear to the jury by the court's instructions. As noted previously, the instruction defining partnership was inaccurate and the testimony of the witnesses evidenced considerable confusion as to whether a partnership, in fact, existed. Equally important is the fact that if the jury had found that a partnership existed, despite

the erroneous instruction, there is nothing in the court's instructions advising the jury that such a finding would eliminate any duty of the defendant to report partnership income on his individual return and, therefore, that they must find the defendant not guilty.

It is a well-settled rule in this circuit that the defendant in a criminal prosecution is entitled to a jury instruction on his theory of the case where the record contains evidentiary support for it. Unites States v. Tsinnijinnie, 601 F.2d 1035, 1040 (9th Cir. 1979);[3] United States v. Nevitt, 563 F.2d 406,409 (9th Cir. 1977); United States v. Ragghianti, 560 F.2d 1376, 1379 (9th Cir. 1977); Charron v. United States, 412 F.2d 657, 660 (9th Cir. 1969). Undeniably there is evidence in the record from which the jury could have found that a partnership existed in the South Palo Verde lot.

Petitioner's requested instruction no. 7, which was refused, clearly explained that there would be no duty to report partnership gross income on an individual return. In place of this instruction, the

district court gave an instruction which stated, "defendant also contends . . . that a taxpayer is only required to report net income from partnerships, not gross income . . ." (RT C409; emphasis added). Of course, it was not error merely to refuse the precise language of petitioner's requested instruction no. 7, but petitioner was entitled to an equivalent instruction which clearly and specifically stated his theory that he had not filed a false return because there was no duty for a partner to report partnership gross income on an individual return. The district court's instruction, which states that "defendant also contends" that a taxpayer is only required to report partnership net income does not make clear that this is a settled legal requirement of the Internal Revenue Code, rather than merely petitioner's contention or interpretation of the law.

The inadequacy of the instruction on petitioner's theory of the case was exacerbated by the confusion caused by the district court's subsequent instructions on petitioner's duty to report income. The district court charged the jury:

> You are instructed that an individual is required to report as gross income on his income tax return all fees, commissions, gains or profits, and income of whatever kind in whatever form paid, derived from any source whatever...

(RT C413; emphasis added). The district court then instructed the jury that "Gross income includes . . . distributive share of partnership gross income . . ." (RT C419). While the last two instructions are technically correct statements of the law they are also broad generalizations lacking the qualifications necessary to make them applicable to the present case. For example, it is only necessary for a partner to report his distributive share of partnership gross income on his individual return in a very limited number of circumstances. See Treas. Reg. § 1.702-1(c). Generally, "(i)n determining his income tax, each partner shall take into account separately his distributive share of the partnership's . . . taxable income or loss . . ." 26 U.S.C. § 702(a)(8). The unmistakable inference that a jury would have drawn from the district court's two income instructions, assuming it understood

them, is that petitioner would have been required to report partnership gross income as well as net income. Therefore, the jury may not even have reached the partnership issue, on which there was sufficient evidence to find that petitioner intended to operate the South Palo Verde lot as a partnership, because it did not understand that the existence of a partnership would have negated any duty by petitioner to report partnership gross income on his individual return.

C. The erroneous partnership definition and the failure to adequately present petitioner's theory of the case fundamentally affected the jury's verdict and constitutes reversible error.

The Court of Appeals held that, even if the trial court's instruction stated a more restrictive standard than the broad federal definition of partnership, the error was harmless.

It is submitted that the error was a fundamental one - directly impacting petitioner's due process protection against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged, In Re Winship, 397 U.S. 358, 364 (1979) and petitioner's 6th amendment right to trial by jury.

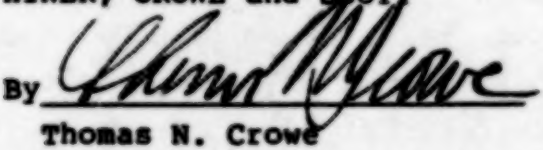
The central theory of the defense was that a partnership existed--or, rather, that petitioner had a good faith basis for believing that a partnership existed--and therefore, that there either was no material omission from defendant's 1973 tax return or that the omission was not willful, which is an essential element of the offense of subscribing to a false return under 26 U.S.C. § 7206(1).

The district court's erroneous partnership definition and the failure to adequately present petitioner's theory of the case raise important questions regarding petitioner's right to proof of guilt beyond a reasonable doubt and his 6th amendment right to trial by jury. The district court's errors affect substantial rights of the petitioner and cannot be viewed as harmless.

IX. CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,
HINER, CROWE and SCOTT

By 
Thomas N. Crowe
Attorneys for Petitioner

June 11 , 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BOBBY L. BUTCHER, Defendant-Appellant.	)	No. 81-1221 D.C. No. CR 80-55 MEMORANDUM

Appeal from the United States District Court for the District of Arizona
Honorable Wesley E. Brown, District Judge Presiding
Argued and Submitted November 12, 1981

Before: KENNEDY, PREGERSON, and REINHARDT, Circuit Judges

Appellant was convicted of one count of violating 26 U.S.C. § 7206 by wilfully subscribing to a false income tax return for the calendar year 1973, and two counts of violating 26 U.S.C. § 7203 by failing to file income tax returns for the calendar years 1974 and 1975. We have examined his allegations of error and found them without merit; we accordingly affirm his

conviction.

(I) The jury instruction defining partnership adequatedly, fairly, and correctly articulated the legal standard for determining whether a partnership exists for federal income tax purposes. In reaching this conclusion, we view the challenged instruction in the context of the instructions as a whole. United States v. Ponticelli, 622 F.2d 985, 990 (9th Cir.), cert. denied, 449 U.S. 1016 (1980). Appellant argues that the first sentence of the challenged instruction,[1] which was taken from the common-law definition of partnership codified in the Uniform Partnership Act, unduly emphasized an element--that of "co-ownership"--that is not essential to a partnership under federal statutory or case law.

The trial court, however, went on to explain that federal standard, listing for the jury a number of factors to consider in

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1. In the challenged sentence, the court stated:

> (Y)ou are instructed that a partnership is an association of two or more persons to carry on as co-owners a business for profit.

determining whether a partnership existed.[2] The description of these factors is taken almost verbatim from Estate of Kahn v. Commissioner, 499 F.2d 1186, 1189 (2nd Cir.

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2. The court stated:

> In determining whether or not the defendant's business ventures were partnerships, you may consider the following: the agreement of the parties and their conduct in executing its terms; the contributions, if any, which each party has made to the venture; the parties' control over income and capital and the right of each to make withdrawals; whether each party was a principal and co-proprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one parts was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; whether the business was conducted in the joint names of the parties; whether the parties filed federal partnership returns or otherwise represented to persons with whom they dealt that they were partners; whether separate books of account were maintained for the venture; and whether the parties exercised mutual control over and assumed mutual responsibility for the enterprise.

1974), quoting Hubert M. Luna, 42 T.C. 1067, 1077-78 (1964), and many of the factors are derived from Commissioner v. Culbertson, 337 U.S. 733, 742 (1949).

Here, every relevant factor indicates that the South Palo Verde lot was not a partnership. Butcher controlled the income and capital; Butcher alone was responsible for any losses; the business was conducted solely in Butcher's name; no partnership return was filed; no representations of partnership status were made to third persons; and Butcher alone controlled and assumed responsibility for the enterprise. Therefore, even if we were to assume that the initial sentence of the trial court's instruction stated a more restrictive standard than the broad federal definition of partnership, it is more probable than not that this "error" did not materially affect the verdict. Hence the alleged error does not merit reversal. United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977).

(II) The jury was adequately apprised of defendant's theory of the case. The jury was instructed as to appellant's

contentions that he relied on his accountant's advice in preparing his 1973 return, and that the South Palo Verde lot was a partnership, whose gross income did not have to be reported on appellant's individual tax return. The instructions adequately covered appellant's theory of the case; it was not error to refuse to use the precise language appellant had requested. United States v. Hughes, 626 F.2d 619, 627 (9th Cir.), cert. denied, 449 U.S. 1065 (1980).

(III) Appellant's contentions regarding an alleged IRS policy of "condoning" late tax returns are devoid of any merit. Even if such a policy existed, it would be quite irrelevant here, where there was a total failure to file.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 81-1221
vs.	)	
	)	O R D E R
BOBBY L. BUTCHER,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: KENNEDY, PREGERSON and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.